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From: Larry Tainter, Director
Bureau of Quality Assurance

Subject: OBRA 1990 Amendments Concerning Patients' Rights to Direct Health Care Decisions
(Advance Directives)

The purpose of this memo is to alert you to new federal requirements concerning "advance directives" which go into effect on December 1, 1991.

Advance directives are written instructions, such as a living will or durable power of attorney, that describes the type of care an individual wishes to receive if s/he becomes incapacitated. The advance directives amendments to the Social Security Act were enacted in the Omnibus Budget Reconciliation Act of 1990. These amendments apply to all federally-certified hospitals, nursing homes, home health agencies, hospices and personal care agencies but exclude facilities for the developmentally disabled. They do not apply to licensed-only hospitals, nursing homes, home health agencies or hospices.

The intent of this legislation is to allow adult patients a direct opportunity to formulate advance directives prior to an incapacitating condition that might leave them unable to express their wishes.

To create this opportunity, federal law requires the following:

- (1) Medicare and Medicaid certified health-care providers are required to develop written material that is given to each new adult admitted on or after December 1, 1991. This material must inform the individual about his/her right to formulate advance directives and his/her right to make decisions regarding medical care, including the right to accept or refuse medical or surgical treatment.

Procedures must be developed so this information can be given to each adult at the time of admission to the nursing home or as an inpatient to a hospital, at the time care is first given to a hospice patient, and in advance of the initial provision of care to a person receiving home health or personal care services.

The amendments also require each provider to educate members of the community (individually or collectively) regarding advance directives. This requirement can be met by explaining advance directives to new patients and/or their families prior to or at the time of admission.

- (2) Each provider is required to formulate a facility/agency policy concerning its position on advance directives. (This might state the facility's intention of honoring and implementing all advance directives or might specify the types of directives that would not be implemented.) Each new admission must be informed in writing of this policy.

The policies and practice of each provider must be consistent with all state laws regarding advance directives. (Please refer to Chapter 154 [Natural Death] , and chapter 155 [Durable Power of Attorney for Health Care], Wisconsin Statutes. Also see BQC memo 90-057, dated June 27, 1990, for information related to durable power of attorney for health care.) Section 4751 of the Act requires the State to develop a written description of state laws concerning advance directives and to distribute these to providers who receive funds from Medical Assistance. This is under development and will be released at a later date.

- (3) Each provider, after ascertaining the decision of each new adult admission to execute or not execute advance directives, will be required to document this decision in the individual's medical record.
- (4) Each provider is required to avoid conditioning the provision of care. or otherwise discriminating against an individual, based on the individual's decision to execute or not execute advance directives.

The bureau is sharing this information so providers have time to establish policies and get systems in place in advance of the effective date. If we receive any additional information from HCFA we will share that, as well. As noted above, a document summarizing the provisions of Wisconsin law is being prepared and will be distributed to all providers when it is finalized. We expect to begin monitoring for compliance with these regulations on surveys conducted after December 1, 1991.

The above changes are found in 42 U.S.C. 1395cc(a)(1) and 42 U.S.C. 1396a(a). They are also recorded in the Congressional Record, October 26, 1990.

Please contact Bob Huncosky at (608) 266-9697 if you have any questions.

LT:BH:bc 7137

cc: -Board on Aging and Long Term Care
-Wis. Assoc. of Homes and Services for Aging
-Wisconsin Association of Nursing Homes
-Wisconsin Counties Assn.
-Wisconsin Medical Records Assoc. Consultants Committee
-Service Employees International Union, Local 150
-Wisconsin Coalition for Advocacy
-Committee on Aging, Extended Care Facilities & Home Health Care
-Wis. Assoc. of Medical Directors (SMS)
-George F. MacKenzie
-Jerry Sandlin, HCFA, Region V
-Wisconsin Hospital Association
-Wisconsin Homecare Organization
-Wis. Assoc. of Hospital Soc. Workers & Discharge Planners
-Bureau of Long Term Support, DCS
-Illinois State Agency
-Indiana State Agency
-Michigan State Agency
-Ohio State Agency